This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

Econ
2232
1.5

From time to time to the Manor of Rensselaerwyck

Econ 2232.1.5

HARVARD COLLEGE
LIBRARY

TRANSFERRED FROM THE
GRADUATE SCHOOL
OF
BUSINESS ADMINISTRATION

THE TITLE

TO THE

MANOR OF RENSSELAERWYCK.

In the Court of Appeals of the State of New-York.

THE PEOPLE OF THE STATE OF NEW-YORK, Respondents,

against

WILLIAM P. VAN RENSSELAER AND OTHERS, Appellants.

OPINIONS,

DELIVEDED ON REVERSING THE JUDGMENT OF THE CIRCUIT COURT, AND THE SUPREME COURT OF THE THIRD DISTRICT, DECEMBER, 1853.

L. S. CHATFIELD, ATT'Y GEN'L, *for the People.*

C. M. JENKINS, *for Appellants.*

ALBANY:

REGISTER PRINT.

1854.

Econ 2232.1.5

HARVARD COLLEGE LIBRARY
RECEIVED THROUGH THE
GRADUATE SCHOOL OF
BUSINESS ADMINISTRATION
JAN 22 1926

Denio

OPINIONS OF JUDGES WILLARD AND ~~HARRIS~~.

In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW-YORK,
against
WILLIAM P. VAN RENSSELAER AND OTHERS.

This action framed under the fifth sub-division of § 143 of the code of 1848, corresponding with § 167 of the present code, was brought to recover real property, without damages, for withholding thereof, and is the substitute provided by the code for the action of ejectment under the former practice. It was commenced in the year 1848, in pursuance of the concurrent resolution of the Legislature of the 6th April of that year in relation to "manorial titles." (L. of 1848, p. 582.)

The complaint alleges that the plaintiffs are the true owners in fee simple and entitled to the immediate possession of a parcel or piece of land situate in the town of Poestenkill in the county of Rensselaer, describing it by metes and bounds, and containing about one hundred and fifty acres of land. It avers that the defendants have entered into and taken possession of and now occupy, possess and enjoy the said land contrary to the said ownership and right of possession of the plaintiffs; whereupon the plaintiffs pray that the right, title and possession of the said land may be adjudged to them, and that the possession thereof may be delivered to them in due form of law

The answer sets forth various defences. First. It alleges that one Kilian Van Rensselaer, son of Jeremiah Van Rensselaer, in the year 1704, entered upon and took the lawful possession of a large tract of land known as the manor of Rensselaerwick, lying on both sides of the Hudson river, beginning at the south end of Bearen Island, and extending up said river to the Cohoes fall, and extending backwards on each side of said river, twenty-four English miles, and containing in the whole more than seven hundred and twenty-six thousand acres of land, of which tract the premises described in the complaint were and are a part, claiming to own and hold the said tract in fee by virtue of a grant and patent of the same bearing date the 20th May, 1704, issued by the then governor of the province of New York, in which was reserved a rent of fifty bushels of good and merchantable winter wheat, payable yearly, and continued to hold the same during his life; that while so holding the same, and on the 11th June, 1718, the said Killian made his will, duly executed to pass real estate, and thereby devised the said tract including the premises in question, (with certain exceptions not necessary to be stated) to his eldest son Jeremiah Van Rensselaer, and in case of his death without issue, to his second son Stephen Van Rensselaer, and his heirs male in fee; and after the execution of said will and about the year 1719 he departed this life, and his son Jeremiah having died without issue, the said Stephen Van Rensselaer, about the year 1745, entered into the said tract, including the premises in question, claiming to hold under the devise from the said Killian Van Rensselaer, and leased divers parts thereof, reserving rent, &c., and so continued to hold during his life. That on the 24th June, 1747, he duly made his will and devised the whole tract, including the premises in question to his only son Stephen Van Rensselaer, and soon thereafter, in the same year, 1747, died, leaving his said son his only heir, him surviving.

That the last mentioned Step'n Van Rensselaer entered and held the said tract of land during his life time, making, leases, &c. and on the 30th August, 1769, he made his will duly executed to pass real estate, and devised the said tract, including the premises in question, to Livingston and Ten Broeck in trust to the use of his eldest son Stephen, and the heirs male of his body, and in default of such issue then in trust for the use of his other sons and children in succession, in which devise the premises in question are included; other provisions of the will are stated in the answer, but they are not material to the case under consideration; after making said will the said Stephen, the testator, died in the same year 1769. Thereupon the trustees entered, occupied and made leases, &c., until Stephen Van Rensselaer, the devisee, became of age in 1785, when he entered and took possession of the whole tract, and occupied making leases, and receiving rent, &c., and collecting arrearages, and so held till his death the 26th January, 1839, that on the 18th April, 1837, he made his will duly executed to pass real estate, and thereby devised to his son,

the defendant, William P. Van Rensselaer, in fee all his lands in said manor on the east side of the Hudson River, embracing the premises in question. That the said William entered and became lawfully possessed thereof and continued to occupy collecting rents, making leases, &c., until the 25th September, 1848, on which day he conveyed a part of the said premises including the land in dispute to the other defendants in trust for the payment of certain debts, &c., by virtue whereof they entered and became possessed lawfully, and have so continued to the commencement of this suit.

The answer, then, states, that the possession of the several persons above mentioned, has never been disturbed but has been repeatedly recognized both by the colonial government and the government of this state since the revolution. That the rent has been paid by the several and successive proprietors of the manor, and received and accepted by the governmen , and, finally in 1806, the then proprietors commuted with the said state for said rents and paid a gross sum of money, which was received in full satisfaction thereof. The answer then sets up the forty years statutes of limitation.

Third Defence.—The answer, then, denies that the plaintiffs have title, or that they are the true owners and entitled to the possession of the premises described in the complaint, for that the said premises together with other lands were, on the 20th May, 1704, duly granted by letters patent, issued by the Governor of the colony of New York, duly authorized for that purpose to Killian Van Rensselaer, son of Jeremiah, in fee, which letters patent also ratified and confirmed certain other letters patent bearing date the 4th November, 1685, duly issued by the then Lieutenant Governor of the colony of New York, duly authorized for that purpose, by which the said premises described in the said complaint, and the other lands described in the patent of 1704, were duly granted to Killian Van Rensselaer son of Johannes Van Rensselaer and Killian Van Rensselaer, the son of Jeremias Van Rensselaer, their heirs and assigns to and for the only use and behcof of the right heirs of one Killian Van Rensselaer, grand fatherto the said grantees and patentees, and which letters patent first above mentioned recite that the said Killian Van Rensselaer sonof said Johannes Van Rensselaer some time in the year 1687, died without issue, whereby the said Killian Van Rensselaer eldest son of the said Jeremias Van Rensselaer, became solely seized and possessed of the premises described in the said letters patent dated 4th November, 1685, and which said Killian Van Rensselaer was the same person, to whom the said letters patent first above mentioned were issued, who, upon the issuing thereof, entered under and by virtue of said patents during his life, and by his will dated 11th June, 1718, devised the said premises, with other lands, to his son Jeremiah Van Rensselaer, and in case of his death without issue, then to his son Stephen Van Rensselaer in fee; and then proceeds deducing title in the defendants as in the first defence.

It then sets up the acts of recognition of the title of those claiming the premises by the colonial government, and by the state government, the payment of rent to both, and the commutation of the quit rents in 1806.

It then denies that the defendants occupy, contrary to any ownership or right of possession of the plaintiffs, and avers that the defendants rightfully and lawfully occupy and enjoy the same under and by virtue of the said patents.

The Reply. First, denies that in the year 1704, one Killian Van Rensselaer, son of Jeremiah Van Rensselaer, or any other person in his behalf, made an entry and took possession of and held a certain large tract of land, situate in the present counties of Albany and Rensselaer, known as the Manor of Rensselaerwyck, lying on both sides of the Hudson river, and containing more than 726,000 acres of land, as is described in the answer, and said to contain the premises described in the complaint in this action—*and they also deny that any person or persons have ever possessed the lands described in the complaint in this action in any manner whatever, and deny that the defendants, or any other person or persons, except the plaintiffs, are, or ever were entitled to the possession thereof.*

2d. The second reply denies that the Governor of the Province of New York, or any other person properly authorized to issue grants or patents for land situate in said Province ever issued a grant or patent for the land described in the complaint, or that any valid patent or grant ever was made of said land, or of any part thereof, or for any tract including the same, within its boundaries, or any part thereof.

3d. If any patent was ever issued, it was obtained by fraud, or upon false suggestions or concealment of some material fact, on the part of the grantee or grantees, and was and is therefore void, &c.

4th. Denies that any of the devises, conveyances, &c , set forth in the answer were ever made, or that any quit-rents were ever paid, or commutation thereof made with respect to the lands in the complaint specified. It alleges that the lands described in the complaint belong to the plaintiffs, as sovereign of the country, and original proprietors thereof.

5th. Denies that either the colony of New York, or the State since its independence, has, by any acts of its legislature, recognized the possession or claim of the defendants, or of those under whom they claim; and avers that the plaintiffs have been continually, since the revolution, and still are, the rightful owners of the premises in the complaint in fee simple, and entitled to the possession thereof, and that the defendants' claim, as set forth in the answer, is without foundation, and not based upon any principle of law or equity.

The cause was tried on the 23d January, 1851, at Troy, before Mr. Justice Harris, without a jury, a jury trial having been waived by the parties.

On the trial the Attorney General read a stipulation, authorizing either party to read certain testimony from the bill of exceptions printed in the case of Teunis Van Vechten vs. Wm. Clute, but gave no evidence, and claimed a judgment for the premises described in the complaint. To this the defendant's counsel objected, the learned

judge overruled the objection and the defendant's counsel duly excepted to such decision.

1*st Exception*, The defendant's counsel then gave in evidence, a duly authenticated copy from the Secretary's office, of letters patent granted by Thomas Dongan, Governor of the Province of New York, under the seal of the Province, dated 4th November, 1685, in the first year of the reign of James the Second, granting to Killian, the son of Johannes Van Rensselaer, and Killian, the son of Jeremias Van Rensselaer, their heirs and assigns, all that and those tracts of land called Renselaerwyck beginning at the south end or part of Barent Island, on Hudson's river, and extending northwards up along both sides of the said Hudson's river into a place heretofore called the Cohoes, or the Great Falls of the said river, and extending itself east and west all along from each side of the said river backwards into the woods twenty-four English miles. It conveyed also other lands not necessary to be stated here, because the premises mentioned in the complaint are parcel of the premises above described. It declared the said grant to be in trust to and for the use and behoof of the right heirs and assigns of Killian Van Rensselaer, grand-father to the said Killian Van Rensselaer, party to these presents, yielding and paying a quit rent of fifty bushels of wheat annually unto our sovereign Lord, the King's majesty, his heirs and successors forever. The patent also erected the said granted premises into a lordship and manor by the name of the lordship and manor of Rensselaerwyck. It further granted to Killian Van Rensselaer, party to these presents, and the heirs and assigns of Killian Van Rensselaer, grand-father of the said Killian, party to these presents, and their heirs and assigns forever, full power and authority at all times forever thereafter to hold a court Leete and court Baron in said manor. The patent contained, immediately preceeding the granting clause, a recital in these words: "Whereas, Killian Van Rensselaer, merchant, late of the city of Amsterdam in the Province of Holland, under the dominion of the States General of the United Provinces in Europe, and the heirs of the said Killian Van Rensselaer at his and their vast expense, cost and charges, have been the first settlers, planters and improvers of all that and those tracts of land hereinafter mentioned, not only during the government of the States General here, but since the same has been under the government and dominion of his royal majesty.

"And whereas, application hath been made to me by Killian Van Rensselaer, of the village or Dorp, of Newkirk, in the province of Guilderland, in Europe, gentleman, naturalized by act of General Assembly, this present session at New York, eldest son and heir of Johannes Van Rensselaer, deceased, who was the eldest son and heir of the said Killian Van Rensselaer, also deceased, for the granting, ratifying, and confirming unto the heirs and family of the said Rensselaers, not only the said tract and tracts of land, but also the liberties, privileges and pre-eminencies, hereinafter mentioned.

"Know ye, therefore, that I, Thomas Dongan, not only for the consideration aforesaid, but also in obedience, and in pursuance and performance of recent orders, directions and command, of his said Majesty, and by virtue of his said Majesty's commission, and authority to me given, and the power in me residing, have given, granted, ratified and confirmed, and by these presents do give, grant, ratify and confirm, unto the said Killian, &c. [as above has already been quoted].

The defendants counsel also gave in evidence the exemplification of a patent granted on the 20th May, 1704, in the third year of the reign of Queen Ann, and issued by Lord Cornbury, then Governor of the Colony of New York, which, among other things, recites the death, without issue, of Killian Van Rensselaer, son of Johannes Van Rensselaer, sometime in the year 1687, whereby Killian Van Rensselaer, eldest son of said Jeremias Van Rensselaer, became solely seized and possessed of the Colony of Renssel-aerwyck, with the hereditaments and appurtenances thereof, and it recites at large the Dongan patent of 1685, before mentioned, and the existence of numerous other facts, which are noticed in the opinion, and then grants, ratifies and confirms, to the said Killian Van Rensselaer, eldest son of Jeremias Van Rensselaer, his heirs and assigns, forever, the premises by metes and bounds, which were described and granted in and by the Dongan patent The defendants deduced a regular title to the patent from the said Killian Van Rensselaer, whose will dated 11 June, 1718, was given in evidence, through the first Stephen Van Rensselaer, whose will dated 24 June, 1747, was given in evidence, and through the 2d Stephen Van Rensselaer, whose will dated 30 August, 1769, was given in evidence, and through the 3d Stephen Van Rensselaer, the late proprietor, whose will dated April 18, 1837, was also put in evidence. The deaths of the respective owners occurred as stated in the answer. That part of the patent lying on the east side of the Hudson river, was devised by the late Stephen Van Rensselaer to the defendant, William P. Van Rensselaer, in fee and embraces, the premises mentioned in the complaint. The deed of trust by William P. Van Rensselaer to the other defendants, conveying certain portions of the lands on the east side of the river, and embracing the lands in disputue, in trust to pay debts, and dated 25 Sept., 1848, was also given in evidence.

It was also shown that the premises in question are part of a tract of about 2000 acres of wild or unappropriated land, and which is embraced within the bounds of the patent, and are surrounded on every side by lands sold or leased by the late S. V. R. That the late S. V. R. always paid the taxes on said land, and was at considerable expense in preserving the timber against trespassers by hiring for that purpose "bush rangers," so called. It was shewn that the several owners of the patent from Killian Van Rensselaer to and including the late Stephen Van Rensselaer, claimed the patent according to its boundaries and granted leases, of portions thereof, reserving rents, and the lessees continued to pay said rents. Eight leases were given in evidences by Killian Van Rensselaer to divers person, dated 1696, 1702, 1705, 1707, 1715 and 1716. Other leases by other proprietors, down to 1772, were shewn. Nineteen leases given by the late Stephen Van Rensselaer from 1787 to 1807,

mostly for farms situated in the town in which the lands in question are situated and in the vicinity of and surrounding the premises in question, were also given in evidence. A lease, dated Oct. 17, 1836 from the late Stephen Van Rensselaer to James Henderson, for lot No. 28, in map of Middletown, which is admitted by the parties to be the lot described in the complaint, and to be within the manor of Rensselerwyck, as described, in the patents therefor above described, was also given in evidence, and it was shown that the said Stephen Van Rensselaer, said lessor, died, January 26, 1839. It was admitted by stipulation that under the several leases above produced from the ancestors of the defendant, William P. Van Rensselaer, there had been a possession by the lessees respectively, co-extensive with the leases, and that the rents reserved in said leases, for the occupation of said land, had been paid pursuant to the reservations, until within about ten years past.

It was also shown that the late Stephen Van Rensselaer, in the year 1806, commuted with the State for the quit-rents charged upon the manor, and received a discharge therefor from the Comptroller. No objection, it is stated in the record, was made to the form or sufficiency of the evidence by which this fact was established, nor any question raised on the trial or arguments on the facts as to the payment of. and commutation for the quit-rents on the whole manor, and the cause was argued in the court below as if such commutations had been fully proved.

The defendants' counsel also read in evidence various statutes of the Colonial Legislature, recognizing the manor, its boundaries and rights; as to one member of Assembly, Bradford's Ed. Colonial Law, pp. 2, 3; as to choosing a supervisor, ib. p. 63; to be part of Albany county, ib. p. 11; concerning fairs in, &c., ib. pp. 18, 20; as to defraying certain expenses in manor, ib. pp. 62, 66; confirming title to manor, ib. p. 7; settling and assuring lands, ib. p. 77.

Also divers laws of the State, recognizing the existence of the manor, and establishing and bounding counties, cities and towns by its lines; 3 R. S., 6, 137, 140. Webster Ed. Laws, 2d vol., pp. 30, 31, 38.

The defendants also proved a statement of the number of leases of farms on the said manor, principally made between the years 1786 and 1800, shewing the towns in which they were situated, and the aggregate amount of rent reserved, from which it appeared that there were three thousand and sixty-three farms held under lease, of which one hundred and ninety were in the town of Poestenkill, in which the premises in dispute lie—that the rent reserved on the leases, on the west side of the river was 23,390 bushels of wheat, and comprising about 233,900 acres of land, and on the east side of the river 20,210 bushels of wheat, and comprising about 202,100 acres of land.

Other matters were proved on both sides, of which such parts as are material are noticed in the opinion.

The testimony being closed, the defendants' counsel contended,

1st. That if title is shown out of the plaintiffs, they cannot recover.

2d. If title is shown in the defendants and others, the plaintiffs cannot recover.

3d. The patents of 1685 and 1704 have not been impeached and are valid.

4th. A good title has passed through them to the defendants.

5th. The plaintiffs have so recognized the title as to waive all objections, and be precluded particularly by the receipt and commutation of quit-rents.

6th. There has been such a holding by the defendant and his ancestors, that the plaintiffs are barred.

The plaintiffs contended,

1st. That the patent of 1704 is void.

2d. The presumption that it was issued with the consent of the council is rebutted by the evidence,

3. The patent is void for false recitals.

1. As to the vast expenses of Killian Van Rensselaer, &c.

2. As to the number of settlers.

3. As to grantee being sole heir.

4. As to Cohoes Falls being on Hudson river.

5. Because the King had already granted all his title by the Dongan patent.

His Honor, Mr. Justice Harris, made the following decision.

"This cause having been tried before the Court, a jury having been waived by the parties, I find and decide the facts and law of the case case as follows:

1. That at the time the Colony was surrendered to the English by the Dutch, in 1664, the heirs of the first Patroon had a just claim under the pledge given by the Dutch charter of Patroons, to a tract of land extending eight miles upon each side of the river, and back from the river a reasonable distance, for the convenient use of actual occupants.

2d. That there was no just claim for a grant of the extravagant character which the Dongan patent presents. Such a grant can only be accounted for by the subserviency of the Colonial Government, and the political troubles which then agitated the parent country.

3. That the grant was made in trust for all the heirs of Killian Van Rensselaer, the first Patroon, and the subsequent grant to Killian Van Rensselaer, the son of Jeremias, in 1704, could not operate to divest those trusts. He still held the premises upon the same trusts specified in the patent of 1685. But whether those trusts were ever satisfied or not, is a question not involved in this action. In either case, the title of the plaintiffs would be divested, if the grant itself was valid.

4. That the provisions of both patents, that of 1685 and that of 1704, whereby manorial privileges and franchises were conferred upon the lord of the manor, were in express violation of the established law, not only in England, but of the colony, and for this reason both grants were illegal and void.

5. That the act of 1691, passed upon the accession of William and Mary to the crown of England, for the purpose of confirming certain grants had no application to these patents. It was a political act, having reference exclusively

to the political troubles through which the country had just passed.

6. That the mere voluntary payment of quit rents to the State could not have the legal effect of barring the right of the people. Nor is there in this case any evidence of such a commutation of the quit rent under the act of 1801, as amounts to a release of the people's right. There is in fact no legal evidence of the payment either of rent or a commutation for rent.

7. That in respect to such portions of the manor as have been actually occupied for an uninterrupted period of forty years under the manor title, the statnte of limitations, independent of any other question, as contrued by the Court of Appeals, is a legal bar to an action by the people.

8. That the patents were not, nor was either of them obtained by any fraud, concealment or false suggestion or recitals on the part of the patentees, nor was the King deceived in making said grants.

And he directed judgment to be entered for the plaintiffs for the recovery of the possession of the premises demanded in the complaint.

The defendant's counsel excepted to each and every of the 2d, 3d, 4th 5th and 6th of such decisions and rulings and to the direction that judgement be given for the plaintiffs.

On appeal to the Supreme Court in the third district, the judgment was affirmed by Justices Harris and Watson, (Justice Parker, dissenting), and the defendant appealed to this court.

CHARLES M. JENKINS,
for Appellants.
L. S. CHATFIELD,
Att'y. Gen. for Respondents.

WILLARD, J.—This was not an action brought by the people to vacate either the Dongan or the Cornbury patents, mentioned in the pleadings, under 2 R. S. 578, § 12, or under § 433 of the code of 1849. Whether such action could be maintained at this day to vacate patents granted by the crown a century and a half ago it is needless now to enquire. (See People vs. Clark. 10 Barb. 120.)

The action on the contrary is, in the nature of an ejectment, though not called by that name since the adoption of the Code of Procedure. It is believed, however, to be governed by the principles which the Legislature have established in relation to that action. By the Revised Satutes it is enacted that no person can recover in ejectment, unless he has at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof or of some share, interest or portion thereof to be proved and established on the trial. 2 R. S. 303, § 8. If the premises for which the action is brought be actually occupied by any person, such actual occupant must be named defendant in the declaration; if they be not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit. Ib § 4. These principles are alike applicable to the people when prosecuting an action to recover the possession of land, and to private persons. The former as well as the latter, must, to entitle them to a recovery, establish a valid and subsisting title in themselves and right to recover possession at the time the action was commenced, and show that the defendants were in possession, or claimed title to the premises in dispute. With respect to making out the proof of title in themselves the people have an advantage over an individual. By right of sovereignty, they are deemed the owners of all the lands within the State, except such as have been granted to others, or have been lost by lapse of time. Hence it is enough for the people to prove in the first instance, that the premises in dispute were vacant and unoccupied within a period necessary to constitute an adverse possession against them, and that the defendants subsequently entered or made claim to them. Wendell vs. The People, 8 Wend. 183. The People vs. Dennison, 17 Wend. 312. 1 R. S. 718, § 1. Constitution, § 11, Art. 1. At the time the counsel for the people rested the cause in this case, there was no sufficient evidence before the court to entitle the plaintiffs to recover, or to require the defendans to be put upon their defence. 1st. There was no proof that the premises had been ever vacant and unoccupied, or that they were prima facie without the bounds of any patent; and 2d, there was no evidence that the defendants were in possession or that they claimed title. Although the defendants possession was asserted in the complaint and admitted in the answer, yet it was denied in the reply. The people are bound by the allegations in their pleadings, like individuals. Notwithstanding the reply was a clear departure from the complaint and as such obnoxious to a demurrer, it is still binding upon the plaintiffs. The pleadings and the whole case show that at the time the plaintiffs rested, they sought, without any evidence of title in themselves, to recover judgment against parties whom their reply asserts never possessed the lands described in the complaint, and were never entitled to that possession. The judge erred, therefore, in putting the defendants upon their defence. The first exception was consequently well taken.

But as the cause was subsequently tried upon its merits, and has been fully and ably argued by learned counsel in this court, it will probably be more satisfactory to all parties that we pass upon one or more of the questions which will be decisive of the action, not only in this, but in any future litigation, upon the same subject.

If either the patent of 1685, called the Dongan patent, or that of 1704, called the Cornbury patent, was sufficient to divest the crown of the title to the land embraced within its boundary lines, the present action cannot be sustained. The people at the revolution succeeded to the rights of the crown, and had the same right to repudiate public grants which the latter possessed, and no more. (I Greenleaf L. N. Y., p. 31, § 14.) In considering this case we must not lose sight of the fact already stated, that this is not an action to revoke those patents. or either of them, and that the learned judge has found as a fact, that the patents were not, nor was either of them, obtained by any fraud, concealment, or false suggestions, or recitals on the part

of the patentees, nor was the king deceived in making said grants. This finding was, in my judgment, based upon sufficient evidence and arguments, and as it has not been appealed from by the people, it must be assumed as the law of the case, in the further discussion of the questions before us.

Although this is not a direct proceeding to vacate the patents, it cannot be denied that objections showing that they were absolutely void from the beginning are open to consideration. In a collateral action they cannot be assailed for any other cause. Jackson vs. Marsh, 6 Cowen, 281. Jackson vs, Lawton, 10 J. R. 23. Jackson vs. Hart, 12 J. R. 77. Bagdell vs. Broderick, 13 Peters', 436. The People vs. Maurah, 5 Denio, 389.

The learned Judge by whom the cause was tried, found, as matter of law, that the grant of lands in both patents was illegal and void, because manorial privileges and franchises were by both conferred upon the Lord of the Manor. And in his learned opinion furnished to the Court on the argument, he holds the Cornbury patent to be also void, because the Dongan patent had already conveyed all the title of the crown to the grantees therein named. If the reason for this latter opinion be correct, the plaintiff had not the slightest ground for a recovery, and judgement should have been given for the defendants. If the crown parted with all its title to the land in 1685, and that title had not been revested by escheat, or otherwise, it had indeed nothing upon which the patent of 1704 could operate, and nothing to which the people at the revolution could succeed; and consequently the latter had no cause of action.

The important question, therefore, is, was the Dongan patent of 1685 operative to convey the title of the premises therein described, to the grantees therein mentioned. In considering this question, we must call to mind the issue which has been framed by the pleadings. The first issue on this point, tendered by the plaintiffs, is, that no such patent was ever granted, and the second is, that if granted, it was obtained by fraud or upon false suggestions, or concealment of some material fact on the part, of the grantee or grantees, and was, and is, therefore, void, and of no force, effect or validity. The first issue is equivalent to *nul tiel record*, and is effectually disposed of by the production of the patent itself, or a legally authenticated copy. The learned Judge did not overrule the defence on the ground that no patent, as described in the answer, ever existed. He concedes its existence, but asserts its invalidity on the ground of matter apparent on its face. The second issue, though loosely framed, was disproved on the trial, and was expressly found for the defendants by the learned Judge.

The judgement of the court below that the Dongan patent was and is null and void, was therefore based upon a ground not set up in the pleadings, or put in issue by them.

It is not denied by the court below that the operative words of grant in the patent were sufficient to convey all the title of the crown of Great Britain to the land described therein to the grantees therein named in fee simple. Had it not been for the grant of manorial privileges and franchises in the same patent, I do not understand that the sufficiency of the instrument to convey land would have been questioned. We are then brought to consider whether a patent of land, granted by the colonial government in 1685, containing the appropriate words for passing the title, in fee, to real estate, is rendered void and in operative, because in the same patent a power is conferred upon the grantees to hold a court Leete and court Baron, and to enjoy the other manorial privileges specified in the Dongan patent. The court below held it to be void for that reason alone.

There are two answers which may be given to this question: First, it was within the competency of the colonial government in 1685 to grant a manor with the usual incidents and franchises of an English barony: and second, if it had no such right, and nevertheless made such grant, in a patent which also, in a distinct part thereof, contained the usual grant of lands to the patentee, his heirs and assigns, the manorial grant alone will be void, and the grant of lands, operative and effectual.

I do not propose to discuss the first question, although I believe the original grant to have been valid, in this respect, and the acts of recognition by the colonial legislature, to be of such a character as conclusively to estop the government from impeaching its validity in a collateral action yet I shall leave this point to be examined by Judge Denio. Whether the manorial privileges were rightfully granted, or legally enjoyed during the continuance of the colony, is not indispensible to the proper determination of this action, unless, indeed, the inserting of those privileges in a grant of lands invalidates the grant. The latter, therefore, is the only point to be considered by me.

The two rules, of most general application, in constructing a written instrument are, 1st, that it shall, if possible, be so interpreted that it shall be effectual, *ut res magis valeat quam pereat*; and 2nd, that such a meaning shall be given to it as may carry out and effectuate, to the fullest extent, the intention of the parties, Broomes maxims, 414, 273. The principles which govern the construction of private grants, are, with some qualifications, applicable to grants from the government. If the Kings charter, says Coke, will bear a double construction, one which will carry the grant into effect, the other which will make it inoperative, the former is to be adopted. Per Tindal, C. J. 1; in Butler vs. Chapman, 8 M. & W. 102. In the Exchecq. Chamber. In accordance with the same principle where divers persons join in a deed, and some are able to make such deed, and some are not able, this shall be said to be his deed alone that is able, (Shep Touch, 81,) and if a deed be made to one that is incapable, and another that is capable it shall enure only to the latter. (ib. 82.) The same doctrine is applicable to the subject matter of a grant. If, with respect to a part of the thing granted the grantor have a right to convey and with respect to the residue he has no right, the deed will be available as to the part to which the grantor had title, and void as to the residue.

This rule prevails in relation to grants from the government. In Danforth vs. Wier, 9; Wheaton 673, both parties claimed title to the land in controversy under grants from different states. The grant to the plaintiff was of land to a part of which the Indian title had not been extinguished, and which, according to law, was not the subject of grant, yet this grant was held good as to the land where the Indian title had been extinguished, and void, as to the rest. The same principle was again asserted by the same court in Paterson vs. Jenks, 2 Peters, 236. A similar doctrine was advanced by the English Common Pleas in Doe. vs. Pitcher 6, Tauton 359, where a deed of land limited to a use within the statute G. 2d ch. 36, and therefore null, was held to avoid other limitations in the same deed, not within the act. The case of the People vs. Mauran, 5 Denio 389 is to the same effect. By the act of 1813, 1 R. L. 202, § 5, all letters patent are required to contain an exception and reservation to the People of this State of all gold and silver mines. A patent was granted in 1816, conveying the premises therein described to the grantee, without the exception required by the statute. An ejectment was brought by the People to recover the land and among other reasons in favor of their recovery it was urged that the patent was void for not containing the required exception and reservation. But the court held that the patent was good for the land and void for the mines. The rule which makes a deed or contract *illegal* in part, void *in toto*, applies only to cases where the two parts are so inseparably connected that one cannot exist without the other. The acts of agents who do more than they are authorized to do, rest upon the same principle. They are good for that which is warranted and void for the rest. Co. Lit. 258, and Story on agency, § 166, 167; 5 Denio, 397. In like manner, if a feoffment be made on condition to do a thing which is *malum in se*, as to kill or rob, J. S., the estate of the feoffee is absolute; and a bond made on such condition is void. Bac. Abr. title Condition K.

In the present case, if it be admitted that a manor could not exist without a grant of land, it cannot be denied that a grant of land without manorial privileges is good. Upon every legitimate principle of construction, the estate granted by the patent was good and vested in the grantee, even if the residue of the grant was void. It follows from the foregoing reasoning that the title to the premises embraced within the manor lines passed by the patent of 1685 to the grantees therein named, and is not shown to have ever reverted to the colony or to the people. The latter, therefore, had no right to maintain this action.

It is not necessary in the present action to establish the title of the present owners of this manor, nor would any further remarks be deemed necessary but to remove the doubts which the decision of the court below may be presumed to have upon the title of the Van Rensselaers to the unoccupied portions of the territory. The Dongan patent was granted to Killian the son of Johannes Van Rensselaer, and Killian the son of Jeremias Van Rensselaer, their heirs and assigns, in trust to and for the use and behoof of the right heirs and assigns of Killian Van Rensselaer, the grand father, &c. The recitals in the patent of 1704, show that at the time of the latter patent, Killian Van Rensselaer eldest son of Jeremias, had become solely, seized and possessed of the whole colony of Rensselaerwyck, with the hereditaments and appurtenances. The latter patent, reciting the former, and the various facts which showed the title vested in Killian, confirmed the same to him, and his heirs and assigns forever. It must be admitted that these recitals and this act of the government were not binding upon other parties. The time which had elapsed since the patent of 1685, was long enough to have satisfied all the trusts contained in that patent, and they might well be presumed to have been satisfied, and the whole estate vested in Killian, the patentee, in the last patent. Its effect was to vest in the patentee every latent interest of the crown, if any there remained. In an action to revoke a patent granted by the crown, the recital of facts not within the knowledge of the government are the suggestions of the patentee, and must, if material, be proved by him. The King is not estopped by a recital in his patent, but the law will rather adjudge him to be deceived. 1 Co. 43, 5 Co. 55, 6 do 55, 10 do 112. But in the present case the pleadings do not put the recitals in issue, and the learned judge has found as a fact that neither of the patents were obtained by any fraud, concealment or false suggestions or recitals on the part of the patentee; and the action moreover is not brought to revoke the patent, but to recover the land upon the ground that no patent ever existed, or if it did, that it was void. A valid commencement of an estate is shown in the patentee under the patent of 1704, which, even if defective, ripened into a right more than a century ago, as against all the world. Either patent is sufficient to bar all right of the people to maintain the present action.

It remains to consider, though not very essential to the defence, some acts of recognition on the part of the government, of the existence and continued ownership of the patent by those in whom the paper title has been traced, and the acts of ownership which have been exercised without interruption by the ancestors of the present owners from the earliest day. These, on the part of the proprietors consist of granting leases, collecting rents, paying taxes. The acts of recognition by the colonial assembly, by the constitution of 1777, and by the Legislature of the State since the revolution, are numerous, and have already been referred to.

It has already been stated that a quit rent of fifty bushels of wheat annually was reserved in both patents. By the act of April 8, 1801, 1 K. & R., 605, 6, §4, it was enacted that any person seized of any lands, &c., as contained in any original grant of the same, charged with an annual quit rent, might commute for the same by paying to the treasuer of this State for the use of the State one dollar and fifty cents for every twelve and a half cents of such annual rent.— The section then points out the receipt which is to be given, describing the lands and tenements on which the said quit rent was chargeable, the date of the grant reserving it, the sum paid in

lieu of it, the officers by whom it is to be countersigned, and the book in which it is to be entered, and enacts "that the said receipt or certificate being so countersigned and entered, or the entry thereof, shall be a good discharge of such quit rent forever."

The defendants counsel prove that on the 4th November, 1752, all the quit rents in the patent were paid from 25th March, 1737, to 25th March, 1752, being seven hundred and fifty bushels of wheat. It was also shown by the Comptroller's certificate, that on the 26th December, 1806, Stephen Van Rensselaer paid up all the arrearages of quit rent, on the upper manor, and commuted for the said quit rent under the act of 1801. Two other receipts for quit rent were given in evidence, one for fifty bushels of wheat, dated in March, 1687–8, and the other for three years' quit rent, and dated 1st Dec., 1705. The form of the commutation receipt was not according to the statute, nor was the apportionment proved to have been made between the upper and the lower patents. The payment and commutation were made upon the upper patents in which the premises in question are situated.—The learned judge in his consideration of the case laid out of view the effect of these payments and commutations on account of the defect in the evidence by which they were sought to be established.

But it appears by the bill of exceptions that the evidence was not objected to, and further, that "No objection was made to the form or sufficiency of the evidence, nor any question raised upon the trial or argument, on the facts as to the payment of, and commutation for the quit rents on the whole manor, but the cause was argued as if such commutation had been fully proved." Under these circumstances, the court below should have treated the cause as if the evidence had been conformably to the statute; and it should be so viewed by this court.

The objection that the rent was payable in wheat, and that the statute is silent as to the commutation of wheat rents, is without force. The statute is general, and applies as well to rents payable in wheat as rents payable in cash. It is well settled in this State that rents payable in wheat, stand on the same footing as rents payable in cash. See 2 Barb. S. C. R. 643, 5 Den. 121, 2 Comstock 135. As the payment of rent by a tenant is a conclusive acknowledgment of the paramount title of the landlord, so the receipt of rent by the landlord is an unequivocal recognition of the estate of the tenant. The effect of the commutation of the quit rent is the same upon the rights of the parties as if the people had made a new grant of the patent, without reservation. Such grant enures to the tenant by way of extinguishment of the rent. Lit. §543. A grant of the rent to the tenant would have the same effect. Lit., §544. The receipt of the sum which the statute prescribes as a commutation of the rent, works not only under the act as a discharge of the rent, but as a confirmation of the estate. The reversion no longer remains in the people, and all the remedies of distress, entry and sale of the premises provided by the statute in case of non-payment, are gone forever. The plaintiffs cannot, after having received rent on the patent for above a century, and at last the commutation money under the statute, maintain an ejectment for the same land, founded upon a supposed defect in the original grant.

As the cause must go back for another trial, and will again be tried if the Attorney General shall so elect, it may be well to pass upon the question of the statute of limitations, interposed in the answer. The people of this State have enacted that they will not sue or implead any person, for or in respect to any lands by reason of any right or title of the people to the same, which shall not have accrued within the space of forty years before suit for the same be commenced, unless the people, or those under whom they claim, shall have received the rents and profits thereof within the space of forty years, (1 R. L., 184, §1.) In the case of the People v. Arnold, 4 Comstock 508, 513, this court hold that to constitute a bar to the right of entry of the people, there must be such a holding for forty years as would constitute a good adverse possession, if the land had been owned by an individual instead of the State.

The court below held the statute applicable only to those parts of the manor which had been actually held under lease from the proprietors, more than forty years prior to the commencement of the suit, and not available to the defendants with respect to this particular lot, because it had never been so occupied. I differ from the court below in this respect, and without adverting to the earlier statutes, am of opinion that the claim of the people is barred by the act of 1801, (1 R. L. 184.

Although for the purpose of this question it must be assumed that both patents were void, still the defendant's title is founded upon a written instrument purporting to be a grant from the colonial government embracing within its limits the premises in dispute. The court below overlooked the fact that the defendants and those under whom they claim, paid both rent and taxes upon the whole patent, and therefore, upon the lot in question; employed agents to protect the latter from trespassers, and finally actually leased it to a tenant a few years before the action was commenced. Moreover they leased out all the land surrounding it to actual occupants. Here was a sufficient possession of the lot, though no one resided upon it, to bring it within the rule required by the statute of limitations. 2 R. S. 294, §10. The statute was designed merely to enact what had been decided by the courts. 6 Cowen 679, 623. It was merely declaratory. If the defendants had such a possession as to enable them to be sued in an ejectment, they had such possession, as would, if continued long enough, ripen into a right. If they had such possession as to be liable to taxation, they ought not, in common fairness, to be treated as having no possession by the government which both imposed and collected the taxes.

The remarks of the learned Judge in the court below with reference to the improvidence of the grant of so large a territory to a single individual, would have been appropriate, if addressed

to the colonial government by whom it was made. But the question for the courts is, not whether the mode of granting patents of large tracts of land to single individuals, was the best adapted for the good of the colony, but whether the grant in question was in fact made. The one is a question of public policy, which the experience of modern times has wisely settled adverse to the practice which prevailed in the infancy of the colony. The other is a mere question of fact, which must be decided by the record of the grant, or acts of recognition by which its existence can be inferred. Many of the acts on the part of the State, and of the late colony of New York have already been noticed, and there are numerous others of the like character, tending strongly to confirm the title under which the defendants claim. But I have not deemed it expedient to dwell longer upon this subject.

The conclusion to which I have come, that the patents were both valid, and were effectual to divest the colonial government of all title to the land in dispute, is enough to dispose of the case upon its merits. I think, too, a regular paper title has been deduced from the original patentee to the present owners, and that their title is good against all the world.

The judment of the Supreme Court and Circuit Court should both be reversed, and a new trial ordered with costs to abide the event.

DENIO, J.

The material facts in this case are very simple. On the fourth day of November, 1685, in the first year of the reign of King James the second, Dongan, the colonial Governor, acting in behalf of the crown, granted, in fee, to two persons, both named Kilian Van Ransselaer, and being, as it seems, cousins and descendants of another Kilian Van Ransselaer, their common grandfather, a large tract of land, of which the premises in question are a part, to hold the same in trust for the right heirs and assigns of Kilian Van Rensselaer, the grandfather, subject to a quit rent of fifty bushels of good winter wheat.

About twenty years afterwards, in the third year of the reign of Queen Anne (Anno Domini 1704) the crown, by Lord Cornbury, the then Colonial Governor, by patent, under the seal of the colony, reciting the former patent and a great number of antecedent transactions tending to show that the Van Rensselaers were entitled to the land from the former Dutch government, and reciting, also, that one of the former patentees had died without issue, whereby the other of them, described as the eldest son of Jeremias Van Rensselaer, became solely seized and possessed of the granted premises, gave, granted, and confirmed unto the surviving Killian Van Rensselaer, his heirs and assigns forever, the tract of land described in the former patent, to be holden of the Queen, her heirs and successors in free and common soccage, yielding and paying a yearly rent of fifty bushels of wheat in lieu and stead of all other rents, services and demands whatsoever.

The defendant, William P. Van Rensselaer, showed title, under the last patent, by devise and inheritance from the last mentioned patentee.

The defendants grandfather came to the title in 1747 and died in 1769, and during his time commenced conveying the premises in farms upon durable leases, which practice was continued by his successors in the title, so that in 1812, about eight-tenths of the lands had been thus disposed of. The premises for which the suit is brought are about one hundred and fifty acres, part of a parcel of two thousand acres of wild and unappropriated land. If either of these patents were operative grants, the defendant has shown title out of the people, and it is not important to enquire whether there are persons in existence, besides the defendant, who could make title under the heirs of Killian Van Rensselaer the grand father of the first patentees.

There is no pretence that the crown or the State has ever acquired title by forfeiture or escheat, or in any other way under the heirs of the first mentioned Kilian, so that this case turns wholly upon the validity of the patents. The provisions which it is argued render the patent utterly void are those which profess to create a manor in the granted premises. It is declared in the first mentioned patent and repeated in substance in the other that the grantor makes and constitutes the tract a lordship and manor to all intents and purposes, to be called the *Manor of Rensselaerwick*. The grantees are authorized in terms to hold a court leet and court Baron, to award fines, have the customary writs, &c., to have the waifs and estrays, deodands, &c., and the patronage of any churches to be erected on the tract; and the freeholders of the manor are empowered to elect a representative to sit in the general assembly in the province of New-York. There is nothing in the patent, which, in terms, empowers the patentees to grant lands to be holden of themselves; but it is argued that the erection of a manor and the authority to hold the courts mentioned which, according to the English law are manor courts, necessarily implies the power to create suitors, who must, of necessity, be tenants holding of the proprietor of the manor owing him suit and service. (Glover vs. Lane 3, Tr. R. 44.) This, it is said, is a violation of the statute, called *quia emptores terrarum*, passed in the eighteenth year of Edward first, (Anno 1290.)

This statute after reciting that feudal tenants have sold their lands to be holden in fee of themselves, instead of the chief lords of the fee, whereby those lords have lost their escheats and other feudal perquisites to their "manifest disinheritance," enacts that "forever hereafter it shall be lawful to every freeman to sell at his own pleasure, his lands or tenements or part thereof, so nevertheless that the *feoffee shall hold* the same lands or tenements *of the same chief lord of the fee* and by the same services and customs as his feoffor held them before." A second chapter provides for an apportionment of the services in case of a sale of a part of the land out of which they issued. (Coke, 2nd Inst. 500.)

The freedom of alienation thus conferred upon the military tenants, was undoubtedly a very material amelioration of the severity of the feudal system, but at the same time, the main

object of the statute would seem to have been to secure to the great Barons their profits arising out of these tenures. It is stated in the statute itself that it was ordained at the instance of the great men of the realm and it was clearly for their protection, though inadvertantly, and probably by its unforeseen operation, it proved a great relief to the inferior tenants. The evil was, that the chief lords were defrauded of the fruits of the tenures, and the remedy provided was, that every tenant however remote should remain the debtor of the chief lord instead of his immediate feoffor for the services incident to the tenure.

But as one may generally waive an advantage secured to himself, so it was held that the chief lord might forego the benefit of the statute by authorizing his tenant to make a sub infeudation, that is, grant lands to be holden of himself; but this could not be done by a mean lord on account of the interest of his superiors. Coke, in commenting on the words "so nevertheless, that feoffee shall hold, &c., of the same chief lord," &c., says: "These general words have a tacite exception, viz: unless all the lords mediate and immediate do assent thereto; for *quilibet renunciare potest benefic' juris pro se introducto.*" For this, two cases are referred to from the year books.

As the King is Lord paramount in all feudal tenures, no subject, since the statute, can, by his own authority, create a manor; and as in England, all the land was granted at or soon after the conquest, it follows that English manors must have their origin prior to the eighteenth of Edward first. But as the King does not hold of any superior, he may grant land to be holden of himself, "for," says Coke "hereby no man is restrained but he which holds over of some lord, and the King holds of none." (2 Inst. 67.) Therefore if there were crownlands in England at this day, which had never been granted to a subject, they might, without doubt, be erected int royal manors. And cannot the King grant to his immediate tenant the right to make grants to be held of himself, the tenant, since thus there would be the assent of all the lords, mediate and immediate? The Kings tenants in capite could not make such grants before the statute *quia emptories*, without his consent (*Lewis on perpetuities*, 18, 14.) This was by force of the Kings prerogative, and was an exception to the general rule which permitted sub-infeudations by all lords except the tenants *in capite*. But I think that as well since as before the statute, the King could license his immediate tenant to alien to hold of himself, the tenant. In grants in *frank almoigne*, the grantee necessarily holds of the donor, and not of any superior lord, because the services can only be rendered to the donor or his heirs, being generally to pray for his and their souls. (2d Bl. Com. 101.) Littleton, moreover, says, that no common person can, since the statute, grant lands in *frankalmoigne* because he cannot alien to be holden of himself. "But, (he says) the King may give lands or tenements in fee simple to hold in *frankalmoigne* or by other services for he is out of the statute." (Sec 140.) In his observations on this section Coke says that a license of the lords mediate and immediate shall enure as a dispensation of the statute *quia emptores*, so that as to lands already granted the consent of the King and all the lords mediate and immediate dispenses with the statutes for "*alienatio licet prohibeatur consensu tamen omnium in quorum favorem prohibita est potest fieri.*" (Co. Litt. 99, a. See Hargraves note, No. 108, where it is shewn that the dispensation refered to is not the exercise of the unconstitutional prerogative of dispensing with statutes which was declared illegal at the revolution. 1 *Thomas, Coke on Litt.* 863.) So also in the *Natura Brevium*, a book of great authority, at the place where grants in *frankalmoigne* are treated of, the author says—after declaring that the King may grant in *frankalmoigne*, "But it seemeth that another lord cannot grant such license to his tenant *by reason of the interests of the lord paramount*, but the King and all the mean lords together may grant licenses unto the tenants paravail who have the fee of the lands, that they may alien the same to an abbott or prior to hold of him in *frank almoigne or to grant the same unto a lay person to hold of him by certain services because that the statute of quia emptores, &c., was made only for the advantage of the lords and therefore they may all dispense with the statute.*" (Fitz. N. B. 211.) The principle is laid down in the same way in *Bacons Abridgment.* "As the statute *quia emptores* was made for the advantage of the chief lords, the King may dispense with it and *license his tenant to reserve any new service.* No other lord can do this by reason of the Kings interest as lord paramount, but the King and the mean lord or lords, may together dispense with the statute and grant a license to the tenant paravail." (Tenure B.) Assuming the law to be as in these authorities stated and assuming further, as the respondents counsel contends, that the grant of a manor and the right to hold manor courts, *ex vi termini*, implied an authority in the patentees to create manor tenants by means of grants reserving services to themselves, it still seems clear that the patents were no violation of the statute so often referred to. The patent so construed was itself a license to the patentee to make grants to be held of himself. On the making of such grants the patentees became the mean lords holding of the King and the grantees of the patentees were the tenants paravail holding by license from the King as lord paramount, of their immediate lords the patentees.

The statute would prevent any further sub-infeudations by the freeholders holding under the patentees unless, indeed, the King and the patentees should both consent.

That this was the understanding of the crown lawyers who prepared the patents for lands in the colonies is evident from the terms of several colonial grants. The charter of Pennsylvania empowered Penn, the patentee, to erect manors, and to alien and grant parts of the lands to such purchasers as might wish to purchase "their heirs and assigns *to be held of the said William Penn*, his heirs and assigns, by such services customs and rents as should seem fit to the said William Penn, &c, and not *immediately of the*

said King Charles his heirs or successors" with a *non-obstante* of the statute *quia emptores terrarum*. (*Ingersoll vs. Sargeant* 1 *Wharton* 348. (Kirk vs. Smith, 9 Wheat 256.) It was stated on the argument, and not denied by the respondents counsel that the records of some ten or twelve patents exist in the office of the Secretary of this State issued respectively in the reign of James II, William and Mary, Anne and George I, with powers respecting a manor and manor courts similar to those in the patents under consideration; and that the proprietary charters of several of the colonies authorize grants to be made to hold of the proprietors. If the statute against sub-infeudations was in force in the colonies, these proprietary grants were as much violations of its provisions as the grants in question in this action, or any other grants from the King. The practice of making such grants for a long course of years is pretty strong evidence that the statute was never understood to apply to grants by the King.

But I think we are not without some evidence of the practical existence of the exception contended for in respect to lands in England. In Sir John Molyn' case (40th Eliz.) there had been an ancient manor of which the King was lord paramount, and there was a mean lord and tenant, and it being forfeited to the crown for treason, it was again granted by King Edward third, to hold of him and other *chief lords of the fee*, and it was held that this manor should be held of the mean lord. (6 Rep. 6.) See also Bewley's case to the same effect. (9 Rep. 130, a.)

The remarks of several writers cited in the opinion of the court below are readily reconcileable with the doctrine which has been stated, when read in connection with what precedes and follows the language cited. It should be remembered that all the land in England was in tenure long before the statute of Edward 1st., and also that copyhold manors to which the authorities relied on generally relate do not arise out of feudal grants, but the tenants hold by the will of the lord according to the custom of the manor, time whereof, &c. (Comyns Dig. Copyhold A;) and that all copyholds are regularly parcel of a manor.

It is in respect to that species of manors, that it is said they cannot begin at this day. (Id. A. 3.) So the note in Petersdoff's Abridgment says, "manors cannot now be created, not even by the King himself," but the reason is given which shews that the subject treated of is copyhold manors, thus: "*length of time being of the very essence of a manor*, and, as Sir Edward Coke expresses it, such things as receive their perfection by the continuance of time come not within the compass of a Kings prerogative; therefore the King cannot grant freeholds to hold by copy and cannot create a custom." (6 Petersd. 309.) The general expressions of writers and judges to the effect that manors cannot have a commencement since the statute of Edward are quite correct if we add the reason which is always understood viz, that all the lands in England are already in tenure and subenfeudations are forbidden by the statute. The remark was never applicable to the ungranted crown lands in the colonies, upon which the statute, I think, never had any or only a qualified bearing. I have considered this question as though the statute was in force, and controlled the tenures in this colony in any case to which in England it might be applicable; and I do not think it material to deny the proposition, though it has been questioned by respectable authority (Jackson & Shultz 18 *John* 179: Depuyster & Michaell, M. S. *Court of Appeals*, November, 1852; *Ingersoll v. Sergeant*, 1 Wharton, 348.) Whether it was generally in force or not, it did not, in my opinion, apply to the ungranted crown lands; and in respect to tenure, the King, I think, was competent to authorize his immediate grantees to create tenants of a freehold manor by granting lands to be held of themselves. It will not be supposed that all the vexatious incidents of the feudal tenures could be engrafted upon these manor lands. If the feudal system ever prevailed in the American colonies it had been shorn of its most severe features, before either of the grants in question was made by the statute 12th, Charles 2d, ch. 24, (Anno 1664,) which abolished the peculiar incidents of the military tenures, and changed them, whether holden of the King or others, into free and common socage; and which was reenacted in this state soon after the revolution with a retrospect to the time of the passage of the English statute. (1 Greenl. 359, §2.)

But suppose all that we find in the patents about a manor and manor courts is inoperative on account of the provisions of the statute against sub infendations, it by no means follows that the grant of the lands is void. It seems not to have been unusual after the passage of the statute, for men still to alien their lands to be holden of themselves upon the same services on which they held them and sometimes upon different services. The consequence was held to be that the alienee held of the chief lord by the old services as the statute requires and not that the feoffment was void, on account of the tenure illegally attempted to be created. (Co. Litt. 502 pl. 7.) It is said that if a patent contains an allegation of untrue matter expressed to be suggested by the grantee by means of which it can be affirmed that the King was deceived, the patent will be adjudged void "but when the words are the words of the King, and it appears that he has only mistaken the law, then he shall not be said to be deceived to the avoidance of the grant" and "if the King is not deceived in his consideration, nor otherwise to his prejudice, but his intent was to pass the lands, only he is deceived in the law, nevertheless his grant shall be good." (Rex. v. Kempe, 1 *Ld. Raymond* 49.) *In Gladstones vs. the Earl of Sandwich* (4 *Man. & Gr.* 995) the principle which I have extracted from the case last cited is approved of and applied by the Court of Common Pleas. It is argued in behalf of the respondents that the grant of a manor is inseparable from the conveyance of the lands. But it seems to me that they are easily separable. By the last patent the land is conveyed to the patentee, his heirs and assigns, to be holden in free and common soccage. This is the ordinary language of a grant in fee simple by a lawful tenure. If what is said about a

manor and manor courts implied a right in the patentee to convey to others to be holden of himself, and that was unlawful, there is no legal difficulty in declaring the patentee entitled to hold the lands, but holding that his alienee must hold of the crown and its successors, instead of holding of the patentee and his heirs. The case is similar in principle to *Darling v. Rogers*, decided in the court for the correction of errors. (22 *Wend.* 483.) An assignment of lands for the benefit of creditors authorized the trustee to mortgage as well as to sell, but the power to mortgage being a trust not authorized by the revised statutes, was void. The court, however, held that this did not avoid the conveyance, and they applied the maxim *ut res magis valeat quam perat*—that the instrument should rather be made available than suffered to fail, and held that the land passed by the assignment.

I am also of the opinion that the people are barred from maintaining this action by the statutes of limitations. The statutes which bar the right of the state contained in the revisions of 1801 and 1813 are, in most respects, if not altogether, mere revisions of the one passed in 1788 divested of its cumberous phraseology (2d Greenl. 93 § 1; *Laws* 1801, ch. 183; 1 R L. (1813(484.)

I do not see, indeed, that there is any difference material to the case. The appellants counsel supposed he had discovered in the language "unless the people of the state of New-York h aue or shall have been answered by force and virtue of any such right or title to the same, the rents, revenues, issues or profits thereof, or the rents issues profits *of any manor or other hereditiments whereof the premises in question shall be part or parcel* within the said space of 10 years" a principle which would give the possessor of part of a manor, claiming title to the whole, the benefit of the statute in respect to a portion of it of which he had not possession. But a careful reading of it will shew, that it is the people who are to be benefitted by receiving the rents of part of a manor, as that circumstrnce will enable them to avoid the bar of the statute, as to the portions in respect to which they have been kept out of the rents. The question then is, whether the appellants can invoke the protection of the statute as to the lot in question, it not having been in actual occupation under their title prior to the year 1886. The tract patented was far too large, to make the possession of even a large part under a claim and colour of title to the whole, a good constructive possession of the parts not occupied, under our decisions, (Jackson vs. Woodruff, 1 Cow, 286 *Jackson & Richards*, 6 id 617. *Sharp vs. Brandon* 15 *Wend.* 597. See also, 2d, R. S. 294, §§ 10, 11. Nor do I think the right given by the leases, to take wood for fuel and fencing from the ungranted lands, or the other acts of ownership which have been mentioned, are sufficient to make out a constructive possession of this lot. But there is another view of the case which I think renders the statute applicable. The crown of England conveyed these lands subject to the payment of a small rent in kind. This rent was claimed, and paid, down to 1806, when it was commuted, under an act of the legislature, by the payment of what was considered a fair equivalent (1. Webs 605 §§ 1, and Seq.)

This rent was claimed and paid as well for the unoccupied portions of the land as for the parts which were occupied. It was the conventional equivalent between the parties for the whole lands patented. It accrued annually, and if not regularly paid, it was ultimately liquidated, upon the basis of an annual ground rent upon a grant in fee. There is no evidence, nor any reason to believe, that the liability to pay it, was ever denied or questioned. Neither the crown nor the people were ever disseized of it. The relationship between the crown and the people on one side, and the patentees and their successors in the title on the other, continued in full activity until the quit rent was finally extinguished.

This relationship was a perpetual admission and agreement, that the parties holding under the patents, were in the possession and enjoyment of the subject, for which the quit rents were the equivalent, that is, of the actual fruits and profits of the soil. Its existence and constant recognition, was entirely hostile to the idea, that the grantors were in the perception of anything growing out of the land, except what had been secured to them by the contract contained in the grant, It concedes that the patentees and their successors, were constantly enjoying all the right, which the patents professed to convey to them, and they were paying to the grantors and their successors the consideration for such enjoyment by them, which had been stipulated between the original parties to the grant. The exception which the people now set up is, that in judgment of law, they and the crown of England to whose rights they have succeeded, have always been in the receipt of the rents and profits of this lot. This is made out, by applying the principle, that unoccupied lands are, in law, considered as held in subordination to the true title. Assuming that the patents are void, it is argued that the government was always legally in possession of this unoccupied lot, and that as possession draws after it the fruits of the land, it was always in the receipt of the rents and profits. That this is the theory upon which the bar of the statute is answered when the defendant cannot make out an adverse possession, See *the Paople vs. Arnold*, (4 Comst. 508.) The statutes, prior to the revision of 1830, do not say anything about adverse possession, and the reason why that was required of one setting up the statute, was that otherwise the land was deemed to be held in subordination to the true title. The owner was never, therefore, out of possession, but was constantly in the receipt of the rents and profits. It was upon this principle that it was held by this court in the case just referred to, that a plea denying that the title accrued within forty years, and denying, also, the receipt of rents and profits by the people within that time was a good bar. The proof in this case would establish such a plea

It is true the people have, in one sense, received the rents and profits. They have received the quit rents, but the statute of 1788 requires that they should be received "by force and virtue of such right and title," that is the right and title

asserted in the action which is sought to be barred. The title by which the quit rents were received by the government was the reservation in the patent which admitted the right to the general profits to be in the patentees. The title sought to be established by the action is not the title to the rent, which was never questioned, but the general and absolute title to the land in hostility to all rights under the patent. The distinction referred to is as old as the days of Lord Coke. In 3 *Inst* p. 188, there is an able commentary upon the 21. Jas. 1, ch. 2, the first *nullum tempus* act, which in the particulars under consideration, as in most others, is literally the same with our act of 1788. "In this branch of the act," he says "these words—answered by force and virtue of any such right and title to the same the rents, revenues, issues and profits thereof,—were *materially* added; for otherwise if the King had been answered, the rents, revenues, &c, by reason or pretext of wardship primer seisin, extent or the like, it might have made a doubt whether such an answering of the revenues &c., had been within the act: which doubt is cleared, that it must be by force and virtue of any such right or title *whereby the King impeacheth the state of the subject.* In other words he must have been answered the rents and profits, that is, have received them by the right and title, he asserts in the action; else it is not within the saving of the statute.

It is well settled that a grantee may hold adversely to his grantor *Brights lesee vs. Rochester*, 7 *Wheat* 535; *Osterhout v. Shoemaker*, 3, *Hill* 518; *The Propagation Soc. v. Paulet*, 4, Pet. 506.)

I concede that an adverse possession is generally essential to enable a defendant to set up the statute in an action by the people as well as where it is brought by an individual. (*People vs. Arnold, Sup. People vs. Livingston*, 8 *Wend*, 253; *Id. v. Van Rensselaer, ib.* 189; *La Frambois vs. Jackson* 8, *Cow.* 589. The rule is absolutely necessary to protect the title of the state to its public lands. Possession being an act of great notoriety, it is required to exist before the statute can commence to run, for the reason that by it, notice is conveyed that the right of the state is questioned.

So in actions between individuals there must be a possession, and it must be hostile to the true owner, before the statute can operate, in order that the owner may be put on enquiry that his rights are chalenged. Now where the adverse holding is under a grant in fact from the party seeking to recover the land, though it may be inoperative in law, and there is a duty to be annually performed by the grantee and his assigns to the grantor, as a consideration of the grant, and this duty is recognized and performed for forty years, both parties being actually participant in its performance, though the grantee has not taken actual possession of the land, it seems to me preposterous to say that the grantor has been all the time, in judgment of law, in the possession of it and in the reception of the general rents and profits.

On the contrary, it appears to me that the consent, recognition, payment and reception of the quit rents is undeniable evidence that as between these parties the possession is in the grantee; certainly it is an admission that it is out of the grantors.

Under such circumstances the actual occupation is immaterial. If this view of the question is correct the respondents were barred in 1800 when the first statute commenced to operate; and if not then, certainly in 1801, when the second statute was passed; for at either period the appellant could allege that the people's title has not accrued within forty years, and that within that time the people had not received the rents or profits of the land. Since the extinguishment of the quit rents, the evidence of which was not objected to, and which *was prima facie* sufficient to prove the fact, the appellant has held in pursuance of the implied assent of the legislature which has done no act impairing the effect of that transaction. Whether this commutation of the rents should be held to transfer a title assuming that the patents were originally void or not, it is clearly enough to disprove the allegation that the people have since been in the reception of the rents and profits of the land.

On each occasion of the repeal of a former statute of limitations to make way for the revised one, there has been a saving of rights accrued under such repealed statute, (Laws 1801 ch. 189 § 1; 2 R. L. (1813 p. 556; 2d R. S., 779, § 5,

Each of the statutes limiting actions by the State to recover lands, prior to the revision of 1830, contained a provision in effect conferring a title upon the party having or claiming manors or lands as against the State, and against certain other patentees. I am of opinion, therefore, that whenever the parties holding under these patents were able, after 1800, to set up that they had been in possession of part of the granted lands claiming the whole for forty years, and during that time had been paying, and the State had been receiving the quit rents reserved by the patents for the whole land, such parties established a title as against the State by force of the statute of limitations which could not be questioned except by the accruing of a new title by escheat or forfeiture or a reconveyance to the people. And this defence the proprietors of the patent could make at any time after the act of 1788, took effect, until 1806, when the quit rents were extinguished, and I think at any time before this action was commenced. (See Jackson vs. Oltz, 8 Wend., 440.)

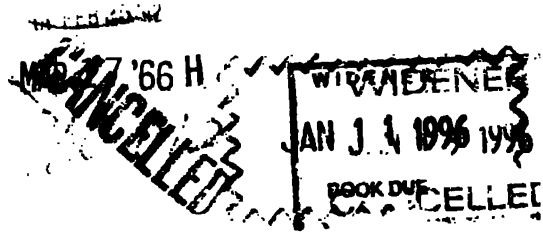
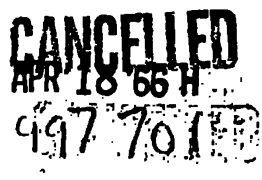
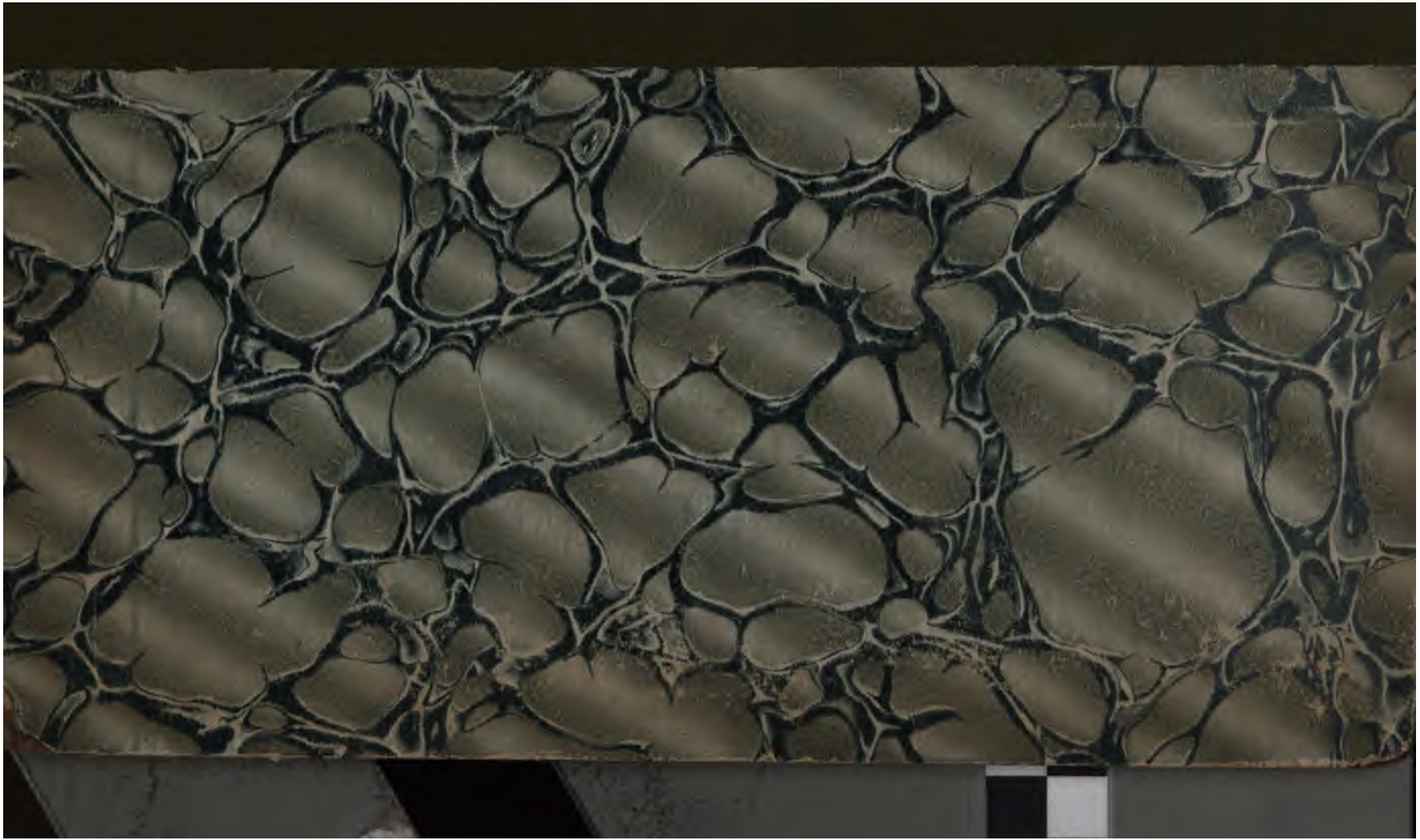
I have said that the evidence of the extinguishment of the quit rents was sufficient. The statute (1 Webster 607, §6,) declares that the treasurer's receipt or certificate of the payment of arrears of quit rents, and of the commutation, countersigned by the Comptroller, shall be a good discharge. The paper produced was the *Comptroller's* certificate stating the money to have been paid to the Treasurer, and containing the matter required to be stated in the one which was to have been signed by the Treasurer. The quit rent reserved was fifty bushels of wheat, but the crown had afterwards granted the manor of Claverack out of the lands which were comprized in the patents to Killian V. R., and the public officers concerned

in the commutation apportioned the fifty bushels of wheat between the manors charging the one now in controversy with forty bushels; and the arrears and commutation were reckoned on that basis; but there was no evidence of an actual agreement to that effect between the proprietors of the two manors. But the bill of exceptions states that no objection was made to the form or sufficiency of the evidence, nor any question raised upon the trial or argument as to the payment of or commutation for the quit rents on the whole manor; but, it is stated, the cause was argued as if such commutation had been fully proved. After this, it is too late to object in a court of review against the sufficiency of the evidence. It was the payment of the arrears and commutation which operated, and not the documentary evidence of it. The evidence *prima facie* established these facts, and if the documents were defective in form, or any preliminaries were required to be shown, the presumption is that the defects would have been supplied if the objection had been duly taken. The principle is very familiar. In the opinion of the court below, it is said that if the commutation had been legally established it would have been such a recognition of the title as would have precluded the State from disputing the defendant's title, but that effect is denied to it from a supposed defect in the evidence. It is clear that the court must have inadvertently overlooked that part of the bill of exceptions to which I have referred. I am inclined to agree with the court as to the effect of the transaction, but not having examined the point fully, I prefer to put the case on the other grounds. I am of opinion also that the colonial act of May, 1691, which was approved by the crown, would protect the appellants against this action if there was nothing else in the case, (Brad. laws, 7, 77. See also a transcript of the act in 8 Barb., S. C. R.) It was passed subsequently to the patent of Gov. Dongan. The answer to this defence is—1st, that the act did not undertake to confirm individual grants, but only charters of corporations, and 2d, that it was only intended to prevent the government established at the revolution, from repudiating the acts of the one which it superceded, and did not apply to defects which would have avoided the grants under the former government, (1.) The most prominent object unquestionably was to ratify corporate and municipal grants; but I think the language is large enough to embrace, and that it was intended to embrace, royal grants of land to individuals. The act is inartificially worded: *manors* were supposed to be corporations and under that name it was intended to confirm them. "All the patents, charters, grants made, given and granted, and well and truly executed under the seal of this province constituted and authorized by their late and present majesties, unto the several and respective corporators, or bodies politic of the cities, towns and manors, and also to the several and respective *freeholders* within the province," are to be held valid against their majesties, their heirs and successors, (§1.) The second section ratifies and confirms the charters, patents and grants aforesaid, "made, given and granted as aforesaid unto all and every, the several and respective corporations or bodies politic of the cities, towns and *manors, and also unto all and every the respective freeholders, their heirs and assigns* forever. The intent to embrace grants in fee to individuals, seems to me to be nearly as strong as language could make it. There are extant grants to the freeholders of towns as a sort of corporation, (2d Wend. 110;) but these could not have been intended, for it is to the several and respective freeholders, within the province; and then it is not to their successors, as in these quasi corporate grants, but to their heirs and assigns forever; and this language could not be applied to any subject with which I am acquainted, except the grants of land to individuals. The proviso to the second section which declares that the act shall not bar any person or persons of their "former and just rights to any house, tract or parcel of land within this province," provided they make their claim in five years; and the saving of the rights of idiots, minors, persons *non compos mentis*, and beyond the seas, strongly confirms this construction. (2.) That the act was suggested by the change of dynasty effected by the revolution of 1688, is undoubted; and one object may have been to prohibit the new reigning house, from revoking the grants of its predecessors; though there was no pretence that James was an usurper, and the revolution did not proceed upon that ground. But the principal thing to be provided against was the disturbing of chartered and vested rights under color of law. This is shown by the *non-obstante* clause. The charters, patents, &c., are to be deemed valid, "notwithstanding of the *want of forms in the law*, or the *non-feasance* of any *right, privilege or custom*, which ought to have been done heretofore by their constitutions and directions contained in the respective charters, patents and grants aforesaid." The reign of James II. was memorable for writs of *quo warranto*, scire facias, and for judgments of ouster, and of repeal of letters patent rendered by judges who complied too readily with the temper of the times, and the wishes of the monarch. (2, Macauley's History. p. 311.) The statute in question was designed to secure the corporate and individual rights which the people of this colony derived from royal charters and grants against all such arbitrary and corrupt proceedings, which, for anything which was known might be resumed by the new or by some future government. It was a time for obtaining new guarantees for personal and proprietory rights, and the colonies were allowed to participate in this new order of things. The patent being confirmed by an act of the legislature, approved by the crown, was no longer liable to be set aside by the courts for want of form or for non-user of privileges or breach of the conditions contained in it. If, therefore, this patent were void for the reasons which have been urged, it was ratified and confirmed by this act of the colonial legislature, and cannot now be impeached.

Upon the whole case, I do not think there was any ground for maintaining this action, and am opinion that the judgment of the Supreme Court ought to be reversed.

3 2044 018 727 545

This book should be returned to the Library on or before the last date stamped below.

A fine of five cents a day is incurred by retaining it beyond the specified time.

Please return promptly.